Filed 2/10/04 P. v. Palomino CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR PALOMINO,

Defendant and Appellant.

F041764

(Super. Ct. No. SC084541)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John I. Kelly, Judge.

Philip M. Brooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez and Tiffany S. Shultz, Deputy Attorneys General, for Plaintiff and Respondent.

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Oscar Palomino (appellant) was convicted of one count of taking or driving an automobile without the consent of the owner in violation of Vehicle Code section 10851, subdivision (a). The jury was unable to reach a verdict on a charge of receiving stolen property in violation of Penal Code section 496d, and a mistrial was declared as to that count. The allegations that appellant had suffered two qualifying prior convictions for

purposes of the three strikes law and served two prior prison terms were found true. Appellant was sentenced to a total prison term of 27 years to life. He asserts that various errors require reversal of both his sentence and conviction. We will affirm.

FACTS

When Ricky Pinchback left his home at 5:00 a.m. to go to work on the morning of July 3, 2002, he left his 2000 Lexus sedan in the garage. The keys to the car were inside the house. When Mr. Pinchback returned home later that evening, he found the door to his house had been broken and the place ransacked. The Lexus and the keys to the car were gone. Also missing were a cordless phone, stereo equipment, two television sets, a lawnmower and $800 in cash.

On July 4, 2002, at approximately 8:30 a.m., California Highway Patrol Officer Christopher Carr noticed a Lexus traveling in a neighborhood where a Lexus was unusual. Officer Carr followed the vehicle, while checking the license plate on his computer. He learned that the car had been stolen the previous afternoon. Officer Carr called for backup and directed the driver of the vehicle, later identified as appellant, to pull over. Passengers in the car were Vanessa Harrigan, her two-year-old daughter, and a male minor. Appellant was taken into custody.

Latent fingerprints taken from Mr. Pinchback's home proved unusable. No one was ever arrested for the burglary.

Mr. Pinchback testified that he did not know appellant and had not given him permission to take or drive his car. Other than scratches on the outside of the car, a tear in the upholstery and a missing CD magazine, the vehicle was intact and undamaged.

DISCUSSION

1. THE TRIAL COURT'S INSTRUCTIONS ON THE MENTAL STATE NECESSARY FOR CONVICTION OF AUTO THEFT WERE ADEQUATE

Appellant was convicted of violating Vehicle Code section 10851, which provides, in pertinent part:

> "(a) Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, … is guilty of a public offense."

Appellant asserts his conviction must be reversed because the trial court failed to define correctly the mental state required for conviction of this offense. The instruction given was:

> "[Appellant] is accused in Count 1 of having violated section 10851 of the Vehicle Code, a crime. [¶] Every person who drives or takes a vehicle not his own without the consent of the owner and *with the specific intent* to deprive the owner either permanently or temporarily of his title to or possession of the vehicle is guilty of a violation of Vehicle Code section 10851, a crime. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person took or drove a vehicle belonging to another person; [¶] 2. The other person had not consented to the taking or driving of his vehicle; and [¶] 3. When the person took or drove the vehicle, he had *the specific intent* to deprive the owner either permanently or temporarily of his title to or possession of the vehicle." (Italics added.)

As argued by appellant, it is possible to intend only to use or operate a vehicle without intending to deprive the owner of possession or title, even when one knows he or she does not have permission of the owner to use or operate the vehicle. Appellant acknowledges the evidence was uncontradicted that he was driving the stolen vehicle when he was arrested, and that the owner of the vehicle had not given him consent to drive it. He contends, however, that his state of mind was crucial and that the jury should have been instructed to acquit if it found he possessed only the intent to use or operate the vehicle.

Appellant relies on the analysis in two cases, *People v. Barrick* (1982) 33 Cal.3d 115 and *People v. Ivans* (1992) 2 Cal.App.4th 1654. However, neither *Barrick* nor *Ivans* dictates the giving of the special instruction appellant suggests. Both *Barrick* and *Ivans* addressed the issue whether the trial court erred in refusing to instruct the jury on a lesser

offense of joyriding. (*Barrick*, *supra*, at p. 133; *Ivans*, *supra*, at p. 1665.) *Barrick* and *Ivans* are two of several cases in which the courts struggled to give effect to a subtle, if not incomprehensible, distinction between joyriding and unlawfully taking a vehicle. (See also *People v. Howard* (1997) 57 Cal.App.4th 323, and cases cited therein.)

In 1996, however, the joyriding statute, Penal Code section 499b, was amended to apply only to bicycles, motorboats, and vessels. The word "vehicle" was deleted from the statute. (Stats. 1996, ch. 660, § 1.) The legislative intent was stated as follows: "to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code. These amendments to Section 499b of the Penal Code shall not be construed as evidencing a legislative intent to eliminate a crime." (*Id.*, § 3.)

The jury here was properly instructed on the elements of violating Vehicle Code section 10851. It also was instructed that the People had the burden of proving appellant guilty beyond a reasonable doubt (CALJIC No. 2.90) and that, in order to find appellant guilty of vehicle theft, there had to be "a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator" (CALJIC No. 3.31). Appellant requested no further instruction, and there is no requirement that pinpoint instructions be given sua sponte. (*People v. Hughes* (2002) 27 Cal.4th 287, 361.) We conclude no error occurred.

In his supplemental opening brief, appellant contends that the alleged instructional error was of federal constitutional dimension and subject to the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24.[1] However, since it appears that the instructions given were proper, there is no need to further address this addition to appellant's claim.

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[1]Appellant makes this same argument in his opening brief.

2. THE PROSECUTOR COMMITTED NO REVERSIBLE MISCONDUCT

The allegations of appellant's prior convictions and prior prison terms were tried before the jury in a bifurcated proceeding. As appellant notes, the only evidence produced on the allegations was a Penal Code section 969b packet, without any live testimony or other evidence. During closing argument, the prosecutor then explained to the jury what various entries on each page of the section 969b packet meant. Objections made by defense counsel, to the effect that the prosecutor was giving testimony in the guise of argument, were overruled. The trial court then instructed the jury and, after a half-hour deliberation, the jury returned verdicts finding all of the allegations true.

On appeal, appellant claims the prosecutor committed misconduct by arguing facts that were not in evidence—that the prosecutor became, in essence, an unsworn witness. Federal and state standards regarding prosecutorial misconduct are well established. Under the federal standard, a prosecutor commits misconduct if his or her behavior is "'''so egregious that it infects the trial with such unfairness to make the conviction a denial of due process.'" [Citations.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Under state law, "[c]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct … only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" [Citations.]" (*Ibid*.) If misconduct occurred, this court must "determine whether it is 'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 753.)

Appellant cites *People v. Bolton* (1979) 23 Cal.3d 208 for the proposition that the prosecutor committed misconduct. In *Bolton*, the deputy district attorney twice hinted in closing argument that, but for certain rules of evidence shielding the defendant, he could show that the defendant had a record of prior convictions or a propensity for wrongful acts. (*Id.* at p. 212.) This case, however, is obviously distinguishable from *Bolton*. The

prosecutor here did not use argument as a back door for placing inadmissible evidence, or even evidence that had simply not been admitted, before the jury.

It is true that counsel may not testify during closing argument, but counsel may emphasize evidence properly adduced at trial. (*People v. Roberts* (1992) 2 Cal.4th 271, 310.) Counsel's argument must be based solely on the evidence presented to the jury, but unquestionably may address logical inferences which can be drawn from the evidence. (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Villa* (1980) 109 Cal.App.3d 360, 365.) Finally, the prosecutor, like any other attorney, may make fair comment on the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The prosecutor's lengthy comments were made in reference to the Penal Code section 969b packet which had been introduced into evidence. A prosecutor generally "proves the prior conviction by introduction of certified copies of the abstract of judgment and records of the Department of Corrections showing imprisonment. [Citations.]" (*People v. Haney* (1994) 26 Cal.App.4th 472, 475.) Section 969b specifically authorizes such proof. In *People v. Prieto* (2003) 30 Cal.4th 226, the Supreme Court approved the giving of an instruction which informed the jury that, if it was satisfied with a section 969b packet which had been presented, "'no other evidence or testimony [was] necessary to prove'" that the defendant had previously been convicted of a felony. (*Prieto*, at p. 258.)

A review of the record in this matter reveals that the prosecutor supplied no information to the jury during argument that was not already before the jury in the Penal Code section 969b packet. He simply directed the jury's attention to particular entries in the packet and noted their import.

We conclude that the prosecutor committed no misconduct in arguing the effect of properly admitted and sufficient evidence.

3. CALJIC NO. 2.90'S DEFINITION OF REASONABLE DOUBT DID NOT DEPRIVE APPELLANT OF DUE PROCESS OR EQUAL PROTECTION OF LAW

Appellant contends the reasonable doubt instruction given to the jury violated his right to due process in that it suggested a lower standard to support a conviction than required by the Constitution. Specifically, he claims the use of the phrase "abiding conviction" in the instruction is insufficient to convey the degree of certainty required by the due process clause of the federal Constitution for proof beyond a reasonable doubt. This same argument was made before this court and rejected in *People v. Light* (1996) 44 Cal.App.4th 879, 884-889. *Light* is dispositive of appellant's contention, and he sets forth no persuasive reason to deviate from its holding.

Relying on the *per curiam* opinion in *Bush v. Gore* (2000) 531 U.S. 98, appellant also claims the instruction denied him equal protection of law, because "it provided no adequate and uniform standard for determining the level of certainty to which the jury must be persuaded in order to assess whether the People have carried their burden of proof, leaving individual jurors on appellant's jury free to apply different standards from each other, and from standards applied by jurors in other trials in California …."

We reject this argument. The potential sweep of the Supreme Court's holding in *Bush v. Gore* is limited by the opinion's own words: "Our consideration is limited to the present circumstances …." (*Bush v. Gore*, *supra*, 531 U.S. at p. 109.)

It is well established, in the context of criminal cases, that

> "'[i]n order to establish a meritorious claim under the equal protection provisions of our state and federal Constitutions appellant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.] Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.]" (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 12; see also *In re Eric J.* (1979) 25 Cal.3d 522, 530; *People v. McCain* (1995) 36 Cal.App.4th 817, 819.)

The language of CALJIC No. 2.90 is taken verbatim from Penal Code section 1096. The Legislature has defined the reasonable doubt standard, and this statutory definition of reasonable doubt is applicable in all criminal trials in all courts in California. There is no alternative statutory definition of reasonable doubt, nor are jurors given the authority to determine for themselves the standard of proof in a criminal case. Appellant has failed to show that persons similarly situated are treated in an unequal manner, and as such, his equal protection argument fails at the threshold. (*People v. Gibson* (1988) 204 Cal.App.3d 1425, 1436.) We decline appellant's invitation to carry the language of *Bush v. Gore*, *supra*, beyond its expressly limited scope.

4. APPELLANT'S SENTENCE OF 25 YEARS TO LIFE FOR VIOLATION OF VEHICLE CODE SECTION 10851 DOES NOT CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT

Appellant argues that his sentence of life imprisonment with a minimum of 25 years for the offense of driving a stolen car violates the federal Constitution's Eighth Amendment ban on cruel and unusual punishment, as well as article I, section 17 of the California Constitution. We do not agree.

Appellant has a criminal history consisting of numerous Vehicle Code violations, including another conviction for taking or driving a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)); a petty theft violation (Pen. Code, § 488); attempted first degree burglary (Pen. Code, §§ 664/460, subd. (a)); receiving stolen property (Pen. Code, § 496, subd. (a)); and two first degree, residential burglaries (Pen. Code, § 460, subd. (a)). Appellant had been released on parole from those two first degree burglary convictions only three months prior to committing the instant offense.

Appellant's attack on his sentence is cursory at best. He refrains entirely from addressing his prior history in advancing his argument regarding cruel and/or unusual punishment. It is clear, however, that under both state and federal constitutional analysis, the sentenced defendant's criminal history is not only permissibly but, in the case of recidivism statutes, necessarily part of the equation. (See *Ewing v. California* (2003) 538

U.S. 11, 19-22; *People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) While we agree that appellant's sentence is harsh, we find no unconstitutional disproportionality to have been shown.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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GOMES, J.